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MBH ARCHITECTS, INC. aka McNULTY
BRISKMAN HEATH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BOVIS LEND LEASE, INC. as assignee
of LNR-LENNAR BRANNAN STREET,
LLC,

Plaintiff,

vs.

MBH ARCHITECTS, INC. aka
McNULTY BRISKMAN HEATH and
DOES 1 through 150, inclusive,

Defendant.

MBH ARCHITECTS, INC. aka
McNULTY BRISKMAN HEATH,

Cross-
Complainant,

vs.

LNR-LENNAR BRANNAN STREET,
LLC, and ROES, 1 through 150,
inclusive,

Cross-
Defendant.

///

CASE No. C 07-05262 JSW

**DEFENDANT MBH ARCHITECTS, INC'S
OBJECTIONS TO PLAINTIFF BOVIS
LEND LEASE'S PROPOSED JURY
INSTRUCTIONS.**

Date: March 30, 2009
Time: 2:00 p.m.
Courtroom: 11
Judge: Hon. Jeffrey S. White

Trial Date: April 20, 2009

1 Defendant MBH ARCHITECTS, INC. ("MBH") will, and hereby does, object to Plaintiff
 2 BOVIS LEND LEASE, INC.'S ("Bovis") Proposed Jury Instructions (attached hereto as Exhibit
 3 A) as follows:

4 **PROPOSED INSTRUCTION No. 1**

5 MBH objects to Proposed Instruction No. 1 to the extent it includes the phrase "harm to
 6 Bovis". The harm in the case was to LNR – Lennar Brannan Street, LLC ("Lennar"). Lennar
 7 allegedly assigned the rights under the contract by Lennar. Thus, any reference to "Bovis" should
 8 state "Lennar, as assignor of its claims to Bovis".

9 In addition, MBH objects to the omission of their affirmative defenses, including: (1)
 10 Failure to Mitigate, (2) Unclean Hands, (3) Estoppel, (4) Waiver, (5) Intervening Cause, (6)
 11 Comparative Negligence, (7) Fault of Other Third Parties, (8) Civil Code § 1473, (9) Ratification
 12 (10) Modification and Misuse of Plans and Designs, and (11) Indemnification.

13 **PROPOSED INSTRUCTION No. 2**

14 MBH objects to Proposed Instruction No. 2 on the basis on the basis it omits "Bovis
 15 Claims that the parties entered into a contract" as set forth in Judicial Council of California Civil
 16 Jury Instruction (CACI) No. 302, December 2008 Supplement.

17 **PROPOSED INSTRUCTION No. 3**

18 MBH does not object to Proposed Instruction No. 3.

19 **PROPOSED INSTRUCTION No. 4**

20 MBH objects to Proposed Instruction No. 4 to the extent it omits the language "Unless the
 21 law provides otherwise" as set forth in California Civil Jury Instructions (BAJI) No. 10.96, Fall
 22 2008 Edition.

23 **PROPOSED INSTRUCTION No. 5**

24 MBH does not object to Proposed Instruction No. 5.

25 **PROPOSED INSTRUCTION No. 6**

26 MBH objects to Proposed Instruction No. 6 on the basis that it omits "Bovis also must
 27 prove the amount of Lennar's damages according to the following instructions."

1 In addition, MBH objects to the inclusion of, “nor must you calculate its damages with
2 exact certainty if you find that Bovis has proved MBH is liable for damages. The law requires
3 only that some reasonable basis of computation be used and the result reached can be a
4 reasonable approximation. However,”. MBH sees no reason to adjust the CACI instruction on
5 which Proposed Instruction is based. The inclusion of the above referenced language would
6 unnecessarily confuse the jury as to the issues.

7 **PROPOSED INSTRUCTION No. 7**

8 MBH objects to Proposed Instruction No. 7 to the extent it states that Bovis was harmed
9 by MBH. Any reference to “Bovis” should state “Lennar, as assignee of its claims to Bovis”.

10 **PROPOSED INSTRUCTION No. 8**

11 MBH objects to Proposed Instruction No. 8 to the extent it substitutes “design
12 professional” for “person” as stated in Judicial Council of California Civil Jury Instruction
13 (CACI) No. 401, December 2008 Supplement.

14 **PROPOSED INSTRUCTION No. 9**

15 MBH objects to Proposed Instruction No. 9 to the extent it substitutes “must” for “may”.
16 MBH also objects to the inclusion of the term “professional” and the substitution of “architecture
17 design industry as testified to by the parties’ expert witnesses” for “community as stated in
18 Judicial Council of California Civil Jury Instruction (CACI) No. 413, December 2008
19 Supplement.

20 In addition, MBH objects to the lengthy omission of relevant language from CACI No.
21 413 as it excludes relevant law related to standard of care and would confuse jury deliberation on
22 that issue.

23 **PROPOSED INSTRUCTION No. 10**

24 MBH objects to Proposed Instruction No. 10 to the extent the instruction categorizes the
25 harm as “Bovis’s” rather than “Lennar, as assignee of its claims to Bovis’s”.

26 **PROPOSED INSTRUCTION No. 11**

27 MBH does not object to Proposed Instruction No. 11.

PROPOSED INSTRUCTION No. 12

MBH does not object to Proposed Instruction No. 12.

PROPOSED INSTRUCTION No. 13

MBH does not object to Proposed Instruction No. 13.

PROPOSED INSTRUCTION No. 14

MBH objects to Proposed Instruction No. 14 on the basis that it states “opinions of expert witnesses” rather than “opinions of design professionals”.

PROPOSED INSTRUCTION No. 15

MBH objects to Proposed Instruction No. 15 on the basis that it references “Bovis” rather than “Lennar, as assignee of its claims to Bovis”.

PROPOSED INSTRUCTION No. 16

MBH objects to Proposed Instruction No. 16 on the basis that it omits the language “that will provide reasonable compensation for the harm.” In addition, MBH objects to the inclusion of “nor must you calculate its damages with exact certainty if you find that Bovis has proved MBH is liable for damages. The law requires only that some reasonable basis of computation be used and the result reached can be a reasonable approximation. However,” as it would confuse the jury as to damages and their deliberation on that issue.

PROPOSED INSTRUCTION No. 17

MBH objects to Proposed Instruction No. 17 on the basis that it addresses issues not raised in the pleadings.

PROPOSED INSTRUCTION No. 18

MBH objects to Proposed Instruction No. 18 on the basis that it addresses issues not raised in the pleadings.

PROPOSED INSTRUCTION No. 19

MBH objects to Proposed Instruction No. 19 on multiple grounds. First, MBH submits that the language “which included extended general conditions costs, extended construction financing costs such as additional loan interest, and increased subcontractor construction costs” is

1 duplicative and would confuse the jury.

2 In addition, MBH objects to any reference to "completion" without stating "final
3 completion date." MBH ask objects to references to "negligence" rather than the "standard of
4 care."


5 Lastly, MBH objects to the reference to "Bovis contends" rather than stating "Bovis, as
6 assignee of Lennar's claims, contends".

7 In addition to the foregoing, MBH reserves the right to assert additional objections.

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9 Dated: March 9, 2009

LONG & LEVIT LLP

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11 By



JOHN B. SULLIVAN
Attorneys for Defendant
MBH ARCHITECTS, INC. aka
McNULTY BRISKMAN HEATH

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